No. 95-1001

IN THE

Supreme Court of the United States

October Term, 1995

JAMES E. DOYLE, IN HIS CAPACITY AS ATTORNEY GENERAL OF THE STATE OF WISCONSIN, AND ALAN T. TRACY, IN HIS CAPACITY AS SECRETARY OF THE WISCONSIN DEPARTMENT OF AGRICULTURE, TRADE AND CONSUMER PROTECTION,

Petitioners,

v.

TIME WARNER CABLE, A DIVISION OF TIME WARNER ENTERTAINMENT COMPANY, L.P.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT PURSUANT TO RULE 29.6

Time Warner Cable is an unincorporated division of Time Warner Entertainment Company, L.P. ("Time Warner Entertainment"). Each of the following general partners of Time Warner Entertainment is a wholly owned subsidiary of Time Warner Inc., a publicly traded Delaware corporation:

American Television and Communications Corporation
Time Warner Operations Inc.
Warner Cable Communications Inc.
Warner Communications Inc.

The limited partners of Time Warner Entertainment are:

U S West Multimedia Communications, Inc.,
a subsidiary of U S West, Inc.
Time Warner Inc.
TW/TAE, Inc., a wholly-owned subsidiary of
Time Warner Inc.

The following are non-wholly owned subsidiaries of Time Warner Entertainment:

The Bountiful Company Limited (U.K.)
Century Venture Corporation
Comedy Partners, L.P.
CV of Viera Joint Venture (partnership)
Dagmar Teatret I/S (Denmark) (partnership)
DC Comics (partnership)
Erie Telecommunications, Inc.
Geffen Pictures (partnership)
HBO Asia Holdings, L.P. (partnership)
HBO Pacific Partners, C.V. (Neth. Antiles)
Kabelkom Holding Co. (partnership)
Kabelkom Management Co. (partnership)
Kansas City Cable Partners
Movie World Enterprises Partnership (Australia)

Queens Inner Unity Cable System
Quincy Jones Entertainment Company L.P. (partnership)
Sari Lodge Pty. Limited (Australia)
Scala Biografome I/S (Denmark) (partnership)
Sea World Enterprises Partnership (Australia)
Time Warner Cable of New Zealand Holdings Ltd. (New Zealand)
Time Warner Entertainment Germany GmbH and Co. OHG (Germany)
Time Warner Germany Holding GmbH (Germany)
Turner/HBO Ltd. Purpose Joint Venture (partnership)
Warner Bros. Movie World GmbH & Co. KG (Germany)
Warner-Lusomundo Sociedade Iberica de Cinemas Lda. (Portugal)
Warner & Metronome Films A/S (Denmark)
Warner Mycal Corporation (Japan)

The following are non-wholly owned subsidiaries of the general partners of Time Warner Entertainment:

American Lawyer Media, L.P. (partnership)
The Columbia House Company (partnership)
The Columbia House Company (Canada) (partnership)
Public Cable Company (partnership)

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INTRODUCTION

1. The Wisconsin Attorney General, James Doyle, asks this Court to review a decision of the Court of Appeals for the Seventh Circuit determining whether the application of a Wisconsin unfair practices law was preempted by a Federal Communications Commission (the "FCC" or the "Commission") regulation in connection with the restructuring of cable television rates and services on September 1, 1993—the day broad rate regulation took effect as a result of the Cable Television Consumer Protection and Competition Act of 1992 ("1992 Cable Act"). Plaintiff-Respondent Time Warner Cable ("Time Warner"), a division of Time Warner Entertainment Company, L.P., opposes that request since the Court of Appeals' decision involved a straightforward application of existing precedents of this Court.[1]

2. Petitioner Doyle grossly exaggerates when he claims that the Court of Appeals' decision has created "uncertainty" for "all consumer protection actions, present and future", casting "a cloud over most consumer action against wrongdoers whose rates are regulated at the federal level". Pet. 22. The Seventh Circuit decision at issue involved an FCC regulation specifically preempting a narrowly defined category of state laws—laws that would impose affirmative marketing obligations on cable operators when they engage in certain restructuring or other similar modifications of their service offerings consistent with FCC-established rate rules. Moreover, the holding of the Seventh Circuit concerns only the application of this preemptive policy to service restructuring undertaken by cable operators (including Time Warner) as part of their efforts to bring their rate and service offerings into compliance with the FCC rate regulations prior to the September 1, 1993 effective date of those regulations.

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[1] Citations to the Petitioners' brief will be in the form of "Pet. __", and citations to its appendix will be in the form of "App. __".

As the FCC has indicated on several occasions, under the unique circumstances surrounding the inception of rate regulation, the application of affirmative marketing requirements to such restructuring would have significantly interfered with cable industry efforts to bring their operations into conformity with their new obligations. *See In Re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation, First Order on Reconsideration, Second Report and Order, and Third Notice of Proposed Rulemaking*, 9 F.C.C. Rcd. 1164, 1209 n.127 (released and adopted Aug. 27, 1993) ("First Order on Recon."); *Warner Cable Communications (Milwaukee, WI)*, LOI-93-14, 10 F.C.C. Rcd. 2103 (Cab. Serv. Bur., adopted Jan. 19, 1995, released Jan. 20, 1995). Indeed, Petitioners' inability to cite any concrete fallout from the Court of Appeals' decision, or the FCC regulation it upheld, lays bare the emptiness of their claim that this Court needs to rectify the outcome.

3. Moreover, Petitioners' claim that the Seventh Circuit's decision conflicts with the decisions in two other circuits is completely unfounded. Aside from being preemption cases involving cable television, those two decisions, *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995) and *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), have nothing in common with the case here. Neither case involved the question of the FCC's statutory authority under the 1992 Cable Act to issue a regulation preempting state law. *Total TV* addressed the question of whether the 1992 Cable Act's rate regulation section itself preempted a California law prohibiting "predatory pricing", not whether the FCC could issue regulations preempting that law. The issue in *Finneran* was whether the rate regulation provisions of a prior statute, the Cable Communications Policy Act of 1984, preempted a state prohibition of a particular charge imposed by cable operators.

BACKGROUND

1.a. September 1, 1993 marked a turning point in national policy concerning communications via cable television. On that date, operators of cable television systems were expected to come into compliance with an extensive and highly complex regime for regulating cable television rates that had been promulgated in May 1993 by the FCC, pursuant to its delegated authority under § 3 of the 1992 Cable Act, 47 U.S.C. § 543. The implementation of rate regulation was an undertaking of enormous proportions. The FCC's Report and Order promulgating its regulations on the subject of cable rates is hundreds of pages long. *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Report and Order and Further Notice of Proposed Rulemaking, 8 F.C.C. Rcd. 5631 (adopted Apr. 1, 1993, released May 3, 1993) ("Report and Order"). The FCC's regulations required cable television operators to obtain detailed data and perform complex calculations for virtually all of their systems in order to evaluate and, where necessary, revise their rate schedules and service offerings in an effort to conform to the new regime. *See, e.g., id.* at 6066 (Appendix D).

b. In connection with the implementation of the new rate regulation regime, many cable operators determined to rearrange or "restructure" the "tiers" of service (groups of cable channels) that they offered to subscribers. Congress and the FCC encouraged cable operators to restructure in this fashion, and the Commission used its broad powers under the 1992 Cable Act to clear away many perceived obstacles to that process, which it regarded as essential for inauguration of the new regime on September 1, 1993. The FCC also preempted the application of state laws that had potential to interfere with the restructuring process. Like other cable operators, on September 1, 1993 (the date the FCC directed that cable systems conform to the new price structure), Time

Warner restructured its cable service in the areas where it does business. As part of its September 1 restructuring in each of the Wisconsin systems in question, Time Warner "unbundled" three or four programming services (for example, E! Entertainment Television and The Discovery Channel) that had previously been available only as part of a tier of services, and began to offer them on what is known as an "a la carte" basis. Existing subscribers were unaffected in both the price they paid and the number of channels they received. The unbundling simply provided them with more options: They could separately drop or keep each of the services in question if they wished, merely by contacting the cable system operator.

2. On August 31, 1993, the day before Time Warner's restructuring was to go into effect, Petitioner Doyle filed a Complaint and Request for Expedited Hearing (the "Administrative Complaint") against Time Warner before the Agriculture Department. App. 72. Petitioner Doyle contended that even though the "a la carte" services were already being provided to subscribers as part of the cable service they had ordered, Time Warner was required to seek each subscriber's assent again if it wished to continue to charge for the services, and that Time Warner's failure to confirm subscribers' continued desire to receive the services constituted an improper "negative option" under Wisconsin's "unfair trade practices" statute, Wis. Stat. § 100.20. The Administrative Complaint sought injunctive relief and "disgorgement" of moneys paid by subscribers to Time Warner for the "a la carte" channels. Time Warner, however, believed that the FCC regulation regarding negative options, with which it had complied, preempted the Wisconsin law as it applied to that September 1, 1993 restructuring of services.

3.a. That FCC regulation, embodied in 47 C.F.R. § 76.981, implemented § 3(f) of the 1992 Cable Act, which provided in part that "[a] cable operator shall not charge a

subscriber for any service or equipment that the subscriber has not affirmatively requested by name". 47 U.S.C. § 543(f).

b. The FCC addressed the negative option provision at length as part of its rate regulation proceeding. The Commission perceived that, if interpreted too woodenly, the negative option provision could be said to come into play with respect to any change in service, however trivial. The FCC noted that while the statutory language "applies to 'any service'", the legislative history clarifies that the provision "does not apply to changes in the mix of programming [services] in a tier". Report and Order ¶ 440, 8 F.C.C. Rcd. at 5905-07 (discussing H.R. Conf. Rep. No. 862, 102d Cong., 2d Sess. 65 (1992)). While operators would be prohibited from adding, at additional cost to subscribers, "new" services which subscribers have yet to "actually receive", the FCC opined that Congress did not intend the negative option prohibition to apply to "change[s] in the mix of channels" or "additions or deletions of channels" unless such changes altered the "fundamental nature" of the service the subscriber had originally ordered. *Id.* at 5906. Indeed, the Act's negative option provision was included in the statute in response to a situation in which another cable operator added a newly-created "per channel" program service to its channel line-up and then proceeded to charge extra for receiving the channel, even though it had *never* previously formed any part of the services ordered by subscribers. *See* 137 Cong. Rec. S7047-48 (daily ed. June 4, 1991) (statement of Sen. Gorton).

c. Similarly, the FCC concluded that, barring some "fundamental change", "restructuring of tiers and equipment, including restructuring appropriate for implementing the Cable Act's provisions", would not violate the negative option prohibition so long as "subscribers will continue to receive the same number of channels and the same equipment". Report and Order ¶ 441, 8 F.C.C. Rcd. at 5907. The Commission reasoned that in such a case "a subscriber

presumably has already 'affirmatively requested' this level of service". *Id.* at 5907-08. Accordingly, as part of its Report and Order, the FCC promulgated a rule concerning negative option billing, which restated the basic statutory prohibition, but also provided:

> "This provision . . . shall not preclude the addition or deletion of a specific program from a service offering, the addition or deletion of specific channels from an existing tier of service, *or the restructuring or division of tiers of service that do not result in a fundamental change in the nature of an existing service or tier of service* provided that such change is otherwise consistent with applicable regulations."

47 C.F.R. § 76.981 (emphasis added).

d. In its Report and Order, the FCC indicated its intention to preempt state laws that were inconsistent with its own negative option billing regulation. Report and Order ¶ 439 n.1095, 8 F.C.C. Rcd. at 5905.[2] The FCC tried to ensure that it remained consistent with the congressional intent to encourage unbundling of services[3] and the Act's negative option billing prohibition on the one hand, and the indication in 47 U.S.C. § 552(c)(1) that Congress did not intend to occupy the field of consumer protection so broadly in the cable area as to oust all state power. In its view, to better effectuate this goal, over the course of the administrative process the FCC ultimately amended the regulation to read:

> "(a) A cable operator shall not charge a subscriber for any service or equipment that the subscriber has not affirmatively requested by name. A subscriber's failure to refuse a cable operator's proposal to provide such service

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[2] *See also First Order on Recon.*, ¶ 86 n.127, 9 F.C.C. Rcd. at 1209.

[3] *See* S. Rep. No. 92, 102d Cong., 1st Sess. 77 (1991).

or equipment is not an affirmative request for service or equipment. . . .

"(b) The requirements of paragraph (a) of this Section shall not preclude the adjustment of rates to reflect inflation, cost of living and other external costs, the addition or deletion of a specific program from a service offering, the addition or deletion of a specific channel from an existing tier or service, the restructuring or division of existing tiers of service, or the adjustment of rates as a result of the addition, deletion or substitution of channels pursuant to Section 76.922 of this Subpart, provided that such changes do not constitute a fundamental change in the nature of an existing service or tier of service and are otherwise consistent with applicable regulations.

"(c) State and local governments may not enforce state and local consumer protection laws that conflict with or undermine paragraphs (a) and (b) of this Section or any other sections of this Subpart that were established pursuant to Section 3 of the 1992 Cable Act, 47 USC § 543." 47 C.F.R. § 76.981 (effective Jan. 1, 1995). App. 71.[4]

4. On September 21, 1993, Time Warner commenced an action in the United States District Court for the Western District of Wisconsin, seeking a ruling that Wis. Stat. § 100.20 had been preempted insofar as it might apply to the aspect of Time Warner's September 1 restructuring that

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[4] *See In re Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992: Rate Regulation*, Sixth Order on Reconsideration, Fifth Report and Order, and Seventh Notice of Proposed Rulemaking, 10 F.C.C. Rcd. 1226 (adopted Nov. 10, 1994, released Nov. 18, 1994) ("Going Forward Order"). Interestingly, the Wisconsin Attorney General's Petition never discusses or fully quotes the actual language of the FCC's regulation.

commenced offering "a la carte" channels. The district court granted summary judgment for Wisconsin and Time Warner appealed. The Court of Appeals reversed the district court, finding that the FCC, by regulation authorized under the 1992 Cable Act, preempted the Wisconsin state negative option law to the extent it interfered with a unique—and uniquely Federal—event, the initial implementation on September 1, 1993 of rate regulation under that Act. The Court of Appeals reached this decision applying this Court's precedents regarding statutory interpretation and preemption by agency regulation.

ARGUMENT

Petitioners claim this Court should hear this case because the Seventh Circuit's decision purportedly has "cast a pall" over state consumer protection actions by making "any cost imposing or refund action by a state . . . subject to FCC preemption" (Pet. 27, 28), and because the Court of Appeals' decision allegedly conflicts with decisions of the Ninth Circuit and Second Circuit Courts of Appeals. Pet. 22-27. Neither proposition is true.

1.a. Petitioners offer not one example of a case where the FCC regulation at issue has preempted state consumer law enforcement other than in connection with the September 1, 1993 restructuring of cable rates and services under the 1992 Cable Act. Therefore, the decision by the Court of Appeals does no more than establish that the FCC has the authority to preempt the application of a state law that interferes with implementation of this one federal statute. It did not establish any broad rule of FCC preemption of state law or indicate that the application of state consumer protection laws in other areas (for example, refund actions not involving rate regulation under the 1992 Cable Act) will be preempted.

b. The Court of Appeals faithfully applied this Court's decisions in *Chevron USA Inc. v. Natural Resources Defense*

Council, Inc., 467 U.S. 837 (1984) and *Fidelity Fed. Sav. & Loan Ass'n v. De La Cuesta*, 458 U.S. 141 (1982), in determining that the FCC had the power to preempt Wisconsin's trade practice law as it applied to Time Warner's September 1, 1993 restructuring. App. 31, 35. According to the court, "the actions of Time Warner were, at the time that it took them, permitted by the federal regulation authorizing a limited range of negative option billing whose prohibition by the states would interfere with the execution of the Commission's rate rules. We believe that the federal regulations, to the extent that they preempt state law, are a permissible interpretation of the congressional authority given the FCC in the 1992 Cable Act." App. 48. The Court of Appeals broke no new ground by its decision.

2. Petitioners describe the Ninth Circuit decision in *Total TV v. Palmer Communications, Inc.*, 69 F.3d 298 (9th Cir. 1995), as holding that the California Unfair Practices Act ("UPA") is not preempted by the "rate regulatory framework of the 1992 Cable Act". Pet. 22. The Wisconsin Attorney General never clearly states why he believes the *Total TV* holding is inconsistent with the Seventh Circuit's decision in this case. This is not surprising since there is no inconsistency. The differences between the issues in the two cases are strikingly clear in several respects.

First, the California statute specifically prohibited predatory pricing and functioned in that respect as an antitrust law. Congress specifically provided that nothing in the Cable Act "should be construed to alter or restrict in any manner the applicability of any Federal or State antitrust law". 47 U.S.C. § 521 note, 106 Stat. 1503 (§ 27). This, the Ninth Circuit found, clearly indicated the intent of Congress that § 543(a)(1) was not to preempt statutes such as the UPA. 69 F.3d at 302-03. The Wisconsin law here was not being applied to address an antitrust problem. Additionally, there

was no similar congressional statement flatly disavowing preemption of state consumer protection laws.

Second, the court in *Total TV* did not find the UPA inconsistent with the Cable Act or any FCC regulation. 69 F.3d at 302, 303 ("the UPA complements, not undermines, the Cable Acts", "the UPA is consistent with the Cable Acts"). Here the application of the Wisconsin statute, as applied to the September 1, 1993 service restructuring, was clearly inconsistent with the FCC regulation at issue.

Third, the *Total TV* court did not discuss either 47 U.S.C. § 552(c)(1), upon which Petitioners heavily rely, or the Seventh Circuit decision in this case—the decision Petitioners claim is directly inconsistent with the result in *Total TV*.

3. Petitioners also claim that the Court of Appeals' decision is inconsistent with the Second Circuit decision in *Cable Television Ass'n of New York, Inc. v. Finneran*, 954 F.2d 91 (2d Cir. 1992), based, it appears, on nothing more than that the Second Circuit there found no preemption of a state regulation while the Seventh Circuit in this case found a state law preempted. In fact, there is nothing inconsistent about the cases.

In *Finneran*, the question was whether a "downgrade charge" was a "rate[] for the provision of cable television service" within the meaning of 47 U.S.C. § 543(a). 954 F.2d at 98. If the "downgrade charge" were found to be such a rate, then, under the terms of the Cable Communications Policy Act of 1984, it was not subject to regulation. *Id.* at 98-99. In *Finneran*, plaintiff CTANY argued that the FCC concurred with its view that downgrade charges were "rates for the provision of cable television services" and cited a footnote in an FCC decision to that effect. *Id.* at 99. The Second Circuit rejected CTANY's argument, based primarily on its conclusion that "[t]here is no indication that the FCC

considered the pre-emptive reach of its statement". *Id.* at 100.[5] Thus in *Finneran*, unlike this case, the scope of the FCC's preemptive regulations was not at issue, nor was the statutory authority of the FCC to preempt.

Moreover, the actual practice at issue here (billing for services customers continue to receive) is entirely different from the practice at issue in *Finneran* (imposition of a charge when cable customers drop services). Thus, the *Finneran* case is far removed from the situation in this case—so much so that the Court of Appeals majority, although mentioning *Finneran* on two other issues (App. 38 n.9, 41 n.13), saw no need to distinguish the *Finneran* court's holding in reaching their conclusion on preemption. Indeed, if the Seventh Circuit's decision here stands, the holding in *Finneran* will not be subject to question. If the Seventh Circuit's decision is reversed, *Finneran*'s validity will be neither enhanced nor diminished.

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[5] Moreover in *Finneran*, that court twice focused on the fact that the statement plaintiff was relying on for its preemption argument was contained in the FCC's discussion of a section of the 1984 Cable Act (47 U.S.C. § 543(b), amended by the 1992 Cable Act) which had the effect of *authorizing* (as opposed to precluding) state regulation of cable company rates under certain circumstances. 954 F.2d at 99-100.

CONCLUSION

For the foregoing reasons, this Court should deny the petition for a writ of certiorari.

January 22, 1996.

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